

Department of Energy

§ 1023.305

the Board on or after August 5, 1985. It also applies to any such proceeding commenced before the Board on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in §1023.310 of this subpart, has been filed with the Board within 30 days after August 5, 1985, and to any such proceeding pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

§ 1023.303 Proceedings covered.

(a) The Act applies to appeals from decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) to the Board as provided in section 8 of that Act (41 U.S.C. 607).

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 1023.304 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the covered proceeding for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth

of not more than \$7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Board determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Board may determine that financial relationships of the applicant, other than those described in this paragraph, constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 1023.305 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was

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substantially justified. The position of the agency includes, in addition to the position taken by the agency in the covered proceeding, the action or failure to act by the agency upon which the covered proceeding is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the agency's position was substantially justified is on the agency counsel.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§ 1023.306 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys or expert witnesses even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney under these rules may exceed \$75 per hour. No award to compensate an expert witness may exceed the highest rate at which the respondent agency or agencies pay expert witnesses. However, an award may also include the reasonable expenses of the attorney or witness as a separate item, if the attorney or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney or expert witness, the Board shall consider the following:

(1) If the attorney or witness is in private practice, his or her customary fees for similar services, or, if an employee of the applicant, the fully allocated costs of the services;

(2) The prevailing rate for similar services in the community in which the attorney or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on

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behalf of a party may be awarded, to the extent that the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of applicant's case.

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§ 1023.308 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States Government that participates in a proceeding before the Board and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

INFORMATION REQUIRED FROM APPLICANTS

§ 1023.310 Contents of application—overview.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency or agencies that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). The applicant shall attach a net worth exhibit that satisfies the requirements of section 1023.311. However, an applicant may omit this statement and forego the attachment of the net worth exhibit if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the